

No. 76-343

Supreme Court, U. S.
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MICHAEL BORK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

GUY HAMILTON JONES, SR., PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 24-31) is reported at 536 F. 2d 269. The opinion of the district court (Pet. App. 33-44) is reported at 401 F. Supp. 168.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1976. The petition for a writ of certiorari was filed on September 7, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner's complaints allege a tort under federal or state law.
2. Whether the individual respondents are entitled to a qualified immunity as a matter of law.

STATEMENT

The petition involves two suits: one filed in the United States District Court for the Eastern District of Arkansas against the United States, a United States Attorney and two of his Assistants, a United States Marshal, and other federal agents; the other, naming the same individual defendants but not the United States, filed in an Arkansas court but removed to the district court pursuant to 28 U.S.C. 1442.

These civil suits arise out of the criminal trial of petitioner for tax evasion and perjury. After his first trial ended in a mistrial, petitioner was convicted in a second trial. *United States v. Jones*, LR-72-CR-8, S.D. Ark., December 8, 1972. The events leading to the declaration of the mistrial form the basis for this litigation.

On a Friday during petitioner's first criminal trial, a juror reported to the United States Marshal that Ray Overton had attempted to contact him on behalf of petitioner. This information was made known to the court and the members of the United States Attorney's office, who immediately contacted officials of the Department of Justice for authorization to investigate. The Attorney General authorized the use of electronic monitoring devices, with the juror's consent, to investigate the alleged attempt to influence the juror's conduct (C.A. App. 24-27).

On the following Tuesday the court informed all parties that an individual had attempted to contact the juror in the interest of petitioner and asked counsel to consider whether they thought it was necessary to move for a mistrial (Pet. 8-9). Later that day the United States Attorney requested a conference in chambers and advised the court and counsel for petitioner of the surveillance placed on the juror with his consent in an effort to

apprehend any individual attempting to influence the juror (Pet. 10-11). The court then declared a mistrial on its own motion.

After exhausting his administrative remedies, petitioner instituted one of the instant suits in federal court against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), and against the individual respondents under 42 U.S.C. 1981, 1983, 1985, and the Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution. The complaint alleged that respondents' actions in contacting the juror amounted to jury tampering, which caused the mistrial and denied petitioner the right to a speedy trial with an impartial jury (Pet. 3; C.A. App. 5-9).¹ Petitioner also filed suit in state court against the individual respondents based on the same allegations (C.A. App. 103-108).

The state court action was removed to federal court and was considered with the federal suit. In support of motions to dismiss, or in the alternative for summary judgment, respondents submitted affidavits from the juror and his wife, the person who had tried to contact the juror and the man who induced him to do it, and all individual respondents, setting out the facts of the incident. The respondents all stated that their actions had been taken in the course of their employment; they denied being part of any conspiracy against petitioner (see, e.g., C.A. App. 51-52, 55, 57-58). The government attorneys who initiated the investigation stated their belief that a mistrial had occurred when the juror learned of the attempt to contact him (C.A. App. 54-55, 57).

¹"C.A." refers to the appendix in the court of appeals.

After a hearing, the district court granted respondent's motions and dismissed the actions (C.A. App. 69, 114). The court held that the complaint did not state a claim under the Federal Tort Claims Act because the complaint did not allege a tort under Arkansas law. The court also held that the complaint did not state a claim under 42 U.S.C. 1985(2),² because it did not allege racial or class-based discrimination, and did not state a claim under the doctrine of *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, because adequate alternative remedies were available to protect petitioner's rights to a speedy trial and an impartial jury (Pet. App. 32-44).

The court of appeals affirmed the district court's rulings with respect to Arkansas law and the scope of 42 U.S.C. 1985, and held, moreover, that the respondents "were acting in good faith based upon reasonable grounds and within the scope of their investigative authority" and thus were entitled to qualified immunity under *Scheuer v. Rhodes*, 416 U.S. 232, and *Apton v. Wilson*, 506 F. 2d 83 (C.A.D.C.) (Pet. App. 27-30).

ARGUMENT

The decision of the court of appeals is correct and raises no issue warranting this Court's review.

1. Petitioner's contention that reasonable actions taken promptly and in good faith to investigate a report of jury tampering constitute a tort under federal or state law is frivolous. The only authority cited for the proposition is *Bizzell v. Booker*, 16 Ark. 308, which, in an entirely different context, stated the general principle that

²The court had previously dismissed the claim under 42 U.S.C. 1983, and petitioner admitted that no claim existed under 42 U.S.C. 1981, 1982, 1984, 1985(1) and (3), or the last clause of 1985(2) (Pet. App. 33).

individuals are responsible for their illegal acts.³ An investigation of jury tampering, conducted reasonably and in good faith, is not illegal under federal or state law and therefore is not tortious under the doctrine on which petitioner relies.⁴

2. In any event, the court of appeals correctly held that the individual respondents were immune from suit (Pet. App. 29). Petitioner's complaints did not allege that the jury-tampering investigation was undertaken without reasonable grounds or in bad faith, and the relevant facts are not in dispute. Respondents' uncontradicted affidavits establish that they were acting in good faith in investigating the juror's allegation that he had been the subject of an attempt to influence his vote as a juror. They had reliable information that an apparently illegal act had occurred and they properly took reasonable steps to investigate. The Attorney General's authorization was obtained to use electronic surveillance equipment (C.A. App. 27-29). The affidavits of two of the prosecutors establish that they believed a mistrial had occurred when the initial contact with the juror had been made

³Even if the respondents' acts had amounted to jury tampering, it is doubtful that Arkansas law would have provided a civil damages remedy, since Arkansas does not recognize a damages remedy for similar claims such as subornation of perjury or submitting false evidence. See *Robinson v. Missouri Pacific Trans. Co.*, 85 F. Supp. 235 (W.D. Ark.); *Ragsdale v. Watson*, 201 F. Supp. 495 (W.D. Ark.).

⁴The complaints do not allege that respondents acted for the purposes of influencing a juror, obtaining a mistrial of petitioner's case, or denying petitioner a speedy trial, and thus do not allege an offense of jury tampering under 18 U.S.C. 1503 or 1504 or Ark. Stat. 41-2806 (1947-1964 Replacement). Indeed, although the complaint alleges that the investigation "caused" the mistrial (C.A. App. 7), it is clear that the mistrial was caused by Overton's contact with the juror and the fear that that contact might prejudice the juror against petitioner (see Pet. App. 30-31).

(C.A. App. 54-55, 57) and that, accordingly, the investigation could not further prejudice petitioner. In addition, the district judge informed the parties of the attempt to contact the juror, indicating that he did so because the parties might wish to move for a mistrial (Pet. 8). In these circumstances, the respondents' good faith belief that their investigation into the juror's allegation was proper was reasonable. Accordingly, the respondents were entitled at a minimum to qualified immunity under the principles of *Scheuer v. Rhodes*, 416 U.S. 232, 247-248; and *Wood v. Strickland*, 420 U.S. 308.

3. Petitioner's complaint against the United States does not state a claim under Arkansas law; accordingly, the courts below correctly held that the claim is not cognizable under the Federal Tort Claims Act, 28 U.S.C. 1346(b). Moreover, petitioner's complaints do not allege a tort under federal law, and, in any event, the individual respondents are entitled to immunity as a matter of law. Accordingly, the courts below correctly held that petitioner's claims against the individual respondents are not cognizable under 42 U.S.C. 1985 or the Constitution.⁵

⁵It is therefore unnecessary to consider the alternative grounds relied upon by the court of appeals concerning the scope of 42 U.S.C. 1985, or by the district court concerning the reach of *Bivens v. Six Unknown Federal Narcotics Agents*, *supra*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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